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IN THE

Supreme Court of the United States

October Term, 1961.

No. 207

ROBERT E. MILLER,

Petitioner,

v.

CARL WELLER, EMILY I. WELLER, EVERETT WELLER, ROY WELLER, MAMIE WELLER, NORMAN E. RITTER and MARJORIE HESTER, Formerly Trading as WELLER MANUFACTURING CO., a Partnership,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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CARL WELLER, EMILY I. WELLER, EVERETT WELLER, ROY WELLER, MAMIE WELLER, NORMAN E. RITTER AND MARJORIE HESTER, FORMERLY TRADING AS WELLER MANUFACTURING CO., A PARTNERSHIP,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Robert E. Miller, petitioner, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above entitled case on March 14, 1961.

CITATIONS TO OPINIONS BELOW.

The opinion of the District Court, printed in Appellants' Appendix, pp. 80a-84a, is reported in 184 F. Supp. 95. The opinions, orders and judgment of the Circuit Court of Appeals, printed in Appendix hereto, *infra*, pp. 9-17, are reported in — F. 2d —.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on March 14, 1961. Rehearing was denied on April 7, 1961. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

QUESTIONS PRESENTED.

1. Where summary judgment given by the District Court in plaintiff's favor is predicated on the ground that the term "damages" clearly encompasses, as a matter of law, the entire fruit of a patent infringement litigation, does not a reversal by the Circuit Court of Appeals, which gives summary judgment to the defendant, deny the plaintiff the right to have decided by a jury the factual issue of what the parties contemplated by use of the term "damages"?

2. May the Circuit Court of Appeals, as a matter of law, confine and narrow the definition of the term "damages" so as to render it inapplicable to money payments to be made in the future under a comprehensive settlement of a patent infringement suit, merely because said payments were cast in the form of royalties?

STATEMENT OF THE CASE.

This is an action based on a written agreement whereby plaintiff retired from a partnership composed of himself and defendants (R. 6-10). Plaintiff filed his complaint on September 10, 1958, claiming that under the retirement agreement he is entitled to share in royalties obtained by the partnership subsequent to his retirement as the result of a patent infringement suit by the partnership against Wen Products, Inc., and Nicholas D. Anton, owner and president of Wen (R. 3-5). The jurisdiction of the District Court was invoked because of diversity of citizenship, the plaintiff being a citizen of Florida, and the defendant a citizen of Pennsylvania.

The partnership from which petitioner retired owned a patent covering electrical soldering guns. The partnership sued Wen Products, Inc. and its owner and president, Nicholas D. Anton, for patent infringement. The suit was pending when petitioner retired from the partnership.

The retirement agreement, dated February 25, 1955, contained the following provision:

> "4. The continuing partners shall pay to the retiring partner (the petitioner herein) the following sums in liquidation of his interest:
>
> • • •
>
> "c. An amount equal to fifteen (15%) percent of any damages collected by the partnership subsequent to the date of this agreement (whether by award of court or jury, or by an out-of-court settlement of any type whatsoever) by reason of the following actions which are presently in litigation; and both of which are in the United States District Court for the Northern District of Illinois, Eastern Division:

"Weller Manufacturing Company, et al

vs.

"Wen Products, Incorporated, and Nicholas T. Anton, Defendants being Civil Action No. 526714 .-. ."

Wen defended the partnership's suit on the ground that the patent was invalid. The District Court held the patent valid and infringed, 121 F. Supp. 198, and the Court of Appeals for the Seventh Circuit affirmed, 231 F. 2d 795. The District Court had referred the question of damages to a master, but before the master's hearings on damages commenced, negotiations were entered into by the partnership and Wen Products, Inc. with a view towards reaching a settlement.

The negotiations were complicated by several factors. First, after the adverse decision of the District Court, Wen stopped making soldering guns with copper tips and changed to guns with steel tips, contending that steel tips did not infringe. The partnership was obliged to concede that this contention had merit. Secondly, although Wen manufactured and sold approximately 400,000 units during the period of infringement, and the partnership's own profit per gun averaged $1.30, it would have been idle for the partnership to insist on a payment of $520,000.00 (single damages) as "damages" because of Wen's poor financial status. Moreover, Wen threatened to dissipate its total assets of $100,000.00 in further litigation should not the partnership grant it a license.

Said negotiations culminated in a comprehensive package settlement agreement whereby:

1) Wen conceded Weller's proprietary interest in steel tip guns,

2) Wen paid $100,000.00 cash and deferred payments of $150,000.00 (labeled "damages") and re-

ceived from the partnership a license to make and sell steel tip as well as copper tip guns under which Wen was to pay an additional amount, labeled "royalties".

Petitioner brought this suit, claiming a right to receive fifteen percent of the royalty payments made by Wen to Weller. The District Court ruled in petitioner's favor, Judge Grim holding the license, as much as the money, to be the "fruit of the patent litigation" (R. 84). The Court of Appeals reversed on a 2-1 decision, the majority holding the word "damages" to be a "word of art" to be narrowly construed (R. 12).

REASONS FOR GRANTING THE WRIT.

1. The necessary result of the opinion of the Circuit Court of Appeals is to limit the meaning of the word damages in any contract dealing with the settlement of patent litigation.

2. The majority of the Court below gave effect to the form of the settlement package rather than its substance. The labels "royalties" and "damages" were permitted to obscure the fact that the settlement as a whole forms the basis of the consideration received by the appellants as the result of the entire Wen litigation. The only way that respondents could obtain the full amount of damages coming to them was to enable the Wen concern to continue its operations. Hence the money payment in the form of royalties was clearly "the fruit of the patent litigation" (R. 84).

Settlement of the question by this Court would aid in the disposition of other patent actions in clarifying whether the term "damages" cannot take its meaning from the circumstances and context surrounding its usage.

3. The issue involved herein has been presented to four learned judges of two courts who, in three separate Opinions, have been evenly divided, two for the petitioner and two for the respondents. Because of this divergence of opinion it is respectfully submitted that the Supreme Court should decide this case.

4. The entry of summary judgment by the Circuit Court of Appeals in favor of the defendant and reversing thereby the entry of summary judgment by the District Court in favor of the plaintiff precludes the plaintiff from having a jury determine the factual circumstances surrounding the usage of the term "damages" in the partnership withdrawal agreement, particularly the phrase *"any damages"* obtained in "an out of court settlement of *any type whatsoever"*.

CONCLUSION.

For the foregoing reasons, the petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Of Counsel.

July 5, 1961.

Certificate of Counsel.

We hereby certify that the foregoing petition is presented in good faith and not for delay.

ABRAHAM E. FREEDMAN,
ALEXANDER B. ADELMAN,
NATHAN LAVINE,
LE ROY COMANOR,
MELVIN LASHNER,
Counsel for Petitioner.

APPENDIX.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

(Filed February 2, 1961)

Argued January 9, 1961

Before GOODRICH, MCLAUGHLIN and FORMAN, *Circuit Judges.*

PER CURIAM

This is an appeal from the judgment of the District Court for the Eastern District of Pennsylvania in favor of the plaintiff in a suit to recover under right claimed under the contract made between the parties. The defendant has appealed. This is a diversity case and that is the only ground of federal jurisdiction. The parties have not raised the point but we must. There is no allegation in the plaintiff's complaint of the citizenship of the defendants. Plaintiff alleges he is a Florida citizen but, of course, in the absence of diversity the federal court has no jurisdiction. Section 1653 of 28 U. S. C. provides, however:

> "Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts."

Pursuant to this statute the plaintiff may, if he can, file an amendment within twenty days which shall state positively that the defendants were citizens of a state other than Florida at the commencement of this action. *Mantin v. Broadcast Music, Inc.*, 244 F. 2d 204 (9th Cir. 1957). Otherwise the action must be dismissed for want of jurisdiction.

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Present: GOODRICH, MCLAUGHLIN and FORMAN,
Circuit Judges.

It is ORDERED that plaintiff be and is hereby granted leave to file an amendment to the complaint within twenty days from the date of this order which shall state positively that the defendants were citizens of a state other than Florida at the commencement of this action. Otherwise the action will be dismissed for want of jurisdiction.

Attest:

IDA O. CRESKOFF,
Clerk.

February 2, 1961

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

(Filed March 14, 1961)

Argued January 9, 1961

Before GOODRICH, MCLAUGHLIN and FORMAN, *Circuit Judges.*

By GOODRICH, *Circuit Judge.*

This is an appeal from a summary judgment for the plaintiff in a suit for an accounting and damages based on a partnership withdrawal agreement. Federal jurisdiction is based on diversity.[1] While the facts are not so very clear the negotiation of the contract and its performance all seem to have a Pennsylvania setting and the law of Pennsylvania is, therefore, applicable. Pa. Annots., Restatement, Conflict of Laws § 332 (1936). The plaintiff, Miller, was a retiring member from a partnership composed of himself and the defendants. Most of the terms governing the amounts to be paid to Miller were clear to both parties and payments have been made as promised.

One of the terms of the contract, however, was that Miller was to receive 15% of "any damages collected by the partnership subsequent to the date of this agreement (whether by award of court or jury, or by an out-of-court settlement of any kind whatsoever)" in a suit which was then pending by the partnership against the corporation

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1. The complaint originally filed in this action imperfectly alleged diversity. We followed the procedure provided in 28 U. S. C. § 1653. See our opinion in Miller v. Weller, F. 2d (3d Cir. 1961). The plaintiff has now amended his complaint to show the requisite allegations without objection by the defendants. We therefore have jurisdiction and proceed to the decision of the case.

known as Wen Products, Inc. and an individual defendant named Anton.

This suit mentioned was being contested in federal courts in Illinois and eventually the plaintiffs (the partners) got a judgment upholding the validity of their patent and sustaining their claim of infringement. Before any master's report on damages, however, the parties after some period of negotiation settled the case. They settled it by the defendants (Wen and Anton) agreeing to pay $250,000 damages for their infringement and the Weller Company, in turn, gave the defendants in the patent suit a license with a royalty provision of 7½%.[2] Now, Miller, having received the stipulated portion of the $250,000 paid claims that he is entitled to 15% of the royalties received by Weller and the trial court agreed with him.

We agree that the case was one for summary judgment but we think the judgment went to the wrong party. This was a contract drawn by lawyers.[3] They used words of art. "Damages," we think, is a word of art with a rather definite meaning. It is something paid in recompense for an infringement of a plaintiff's legal right by the defendant's liability-creating conduct.[4] Damages for

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2. By the terms of this agreement the license was granted as of the date of the agreement (May 1, 1956), and the $250,000 was to be "in complete settlement of all claims . . . for past damages."

3. The appellee's brief states:

> "The agreement in question was drafted by counsel and counsel witnessed the signatures of the parties." *Id.* at 8, n. 4

4. "Damages means compensation for a legal injury sustained." Sechrist v. Bowman, 307 Pa. 301, 310, 161 A. 2d 332, 335 (1932).

See Balantine, Law Dictionary, "Damages" (1930); Bouvier, Law Dictionary, "Damages" (1914); Joyce, Damages § 2 (1903). See also Paul v. Hood, 271 Wis. 278, 73 N. W. 2d 412 (1955); Kanter v. Safran, 68 So. 2d 553 (Fla. 1953); Freigy v. Gargaro Co., 223 Ind. 342, 60 N. E. 2d 288 (1945); Perkins v. Benguet Consol. Mining Co., 55 Calif. App. 2d 720, 132 P. 2d 70 (1942).

patent infringement are compensation awarded to the patentee for a legal injury to his rights, compensation for an injury actually undergone.[5] The Pennsylvania courts have said, citing the Restatement, that when parties use words of art in an agreement the usual meaning of the word of art is to be applied in deciding what the contract means.[6]

When the meaning of a word is so generally recognized in the law and when in a contract the word is used in an agreement which lawyers have drawn up and had their clients sign, we think that meaning for the word is to be applied in deciding what the obligations of the agreement are. To vary that meaning under these circumstances is, we think, contrary to the general rule that when the parties have "memorialized" their agreement in a written contract that instrument defines the extent of their obligations.[7]

The foregoing being our view of this case, the district court incorrectly decided it. The plaintiff has received his contractual share of the damages paid. He is not entitled to any part of the royalties received or to be received.

The judgment of the district court will be reversed and the case will be remanded with directions to enter judgment for the defendant.

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5. Birdsall v. Coolidge, 93 U. S. 64 (1876). The statutory language is "damages adequate to compensate for the infringement . . ." 35 U. S. C. A. § 284.

6. Fischer & Porter Co. v. Porter, 364 Pa. 495, 72 A. 2d 98 (1950), citing Restatement, Contracts § 235(b) (1932). *Cf.* the Pennsylvania Statutory Construction Act, Pa. Stat. Ann., tit. 46, § 533 (1952).

7. See Waldman v. Shoemaker, 367 Pa. 587, 80 A. 2d 776 (1951); Williston, Contracts § 632 (rev. ed. 1936); Restatement, Contracts § 230, comment b (1932).

Re: Miller v. Weller, et al., No. 13,377

McLAUGHLIN, *Circuit Judge*, dissenting.

I agree with the opinion of the district judge, 184 F. Supp. 95 (E. D. Pa. 1960), that the license, from which the disputed royalties flow, is just as much the direct result of the patent litigation as the actual cash paid by Wen. The facts support the trial court's conclusion "• • • that without getting the license Wen would not, in all probability, have paid any money, whether under a settlement or a final judgment." It follows, as Judge Grim said, that "The license, therefore, • • • is comprehended within the term 'damages', particularly in view of the inference to 'an out-of-court settlement of any type whatsoever.' "

I would affirm the judgment of the district court.

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Present: GOODRICH, MCLAUGHLIN and FORMAN,
Circuit Judges.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby reversed, with costs, and the case remanded with directions to enter judgment for the defendant.

Attest:

IDA O. CRESKOFF,
Clerk.

March 14, 1961

OPINION SUR REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

(Filed April 7, 1961)

Before GOODRICH, MCLAUGHLIN and FORMAN, *Circuit Judges.*

PER CURIAM.

After due consideration the petition for rehearing in the above-entitled case is hereby denied.

MCLAUGHLIN, *Circuit Judge,* dissenting.

In dissenting to the denial of the powerful petition for rehearing filed in this cause, I repeat my dissent to the opinion of the majority on the merits of this appeal.

ORDER SUR PETITION FOR REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Present: GOODRICH, MCLAUGHLIN and FORMAN,
Circuit Judges.

After due consideration the petition for rehearing in the above-entitled case is hereby denied.

Attest:

IDA O. CRESKOFF,
Clerk.

Dated: April 7, 1961

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

OPINION BELOW.

The opinion of the District Court, printed in Appellants' Appendix, pp. 80a-84a, is reported in 184 F. Supp 95. The opinions, orders and judgment of the Court of Appeals for the Third Circuit, printed in petitioner's appendix, pp. 9-17, are reported in 286 F. 2d 172, and — F. 2d —.

JURISDICTION.

The judgment of the Court of Appeals was entered on March 14, 1961. Rehearing was denied on April 7, 1961. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

QUESTION PRESENTED.

Where the language of a partnership withdrawal agreement entitled the retired partner to share in "damages" obtained by the partnership in a law suit against a patent infringer, and where no material fact is disputed and both sides moved for summary judgment, did the court below err in holding as a matter of state law that the agreement entitled the retired partner to share in compensation obtained for past injury but did not entitle him to share in royalties thereafter paid by the former infringer under a license covering future manufacture?

STATEMENT OF THE CASE.

1. **Nature of the claim.** This is an action for an accounting based on a written agreement whereby petitioner, Robert E. Miller, who was formerly in partnership with respondents, withdrew from the partnership (R. 3a, 6a-10a). The agreement, entered into on February 25, 1955, provided that Miller's capital interest was liquidated by payment to him of $121,000, plus $15,000 a year for five years, "in consideration of past services," and, in addition, 15 per cent of "any damages collected by the partnership subsequent to the date of this agreement (whether by award of court or jury, or by an out-of-court settlement of any type whatsoever)" in a then pending patent infringement suit which had been brought by the Weller partnership against Wen Products, Inc. and its president, Nicholas T. Anton (R. 7a-8a).

In the sharply contested infringement suit, which involved a patent for an electrical soldering gun, the United

States District Court for the Northern District of Illinois sustained Weller's substantive claim of infringement and denied a motion for a new trial by Wen and Anton, 121 F. Supp. 198, 135 F. Supp. 121. After affirmance of the judgment by the Court of Appeals for the Seventh Circuit, 231 F. 2d 795, but before the case went before a master on the issue of damages (R. 27a), the litigation was settled on May 1, 1956, by an arrangement whereby Wen and Anton agreed to pay Weller, "in complete settlement of all claims * * * for past damages and attorney's fees * * * growing out of" the suit, the sum of $250,000 (R. 13a). At the same time, Weller granted to Wen as of May 1, 1956, a license to make and sell the electrical soldering gun and Wen agreed to pay a royalty of 7½ per cent on the price of each gun sold (R. 11a, 12a).

Miller received 15 per cent of the $250,000 damages paid to Weller in settlement of the infringement claim (R. 5a, 13a) but, nevertheless, brought this suit two years after the settlement, claiming, in addition, a right to receive 15 per cent of the **royalty**[1] payments made by Wen to Weller for the license to manufacture and sell the soldering gun on and after the date of the settlement (R. 5a).

2. **The settlement agreement.** The motives which induced Weller to settle its suit against Wen by the arrangement of May 1, 1956, are clear from the uncontroverted facts contained in Weller's answers to interrogatories (R. 27a-42a), and in the deposition of the patent attorney who served as the chief negotiator for Weller in the settlement conference requested by Wen (R. 54a-79a).

Investigation by Weller at the time of the settlement negotiations indicated the number of soldering guns made by Wen during the period of infringement to be approximately 400,000 units, which yielded an estimated dollar

1. Wherever boldface appears in this brief the emphasis is ours.

volume of sales of approximately $2,500,000. The calculation of Weller's damage figure based on this volume was made more difficult by the fact that Wen had, since the decree of the Illinois district court, begun to make the gun with a steel tip (R. 29a, 57a), claiming that this gun was not reached by the decree which mentioned specifically only a copper tip gun (R. 57a).

In addition to the uncertainty thus created as to the number of units and dollar volume on which damages would finally be based, Weller considered that it would be impossible to prove that all sales by Wen were sales lost by Weller (R. 29a, 58a). Weller, therefore, based its damage figure on a reasonable royalty calculated on Wen's total sales, and placed this at 10 per cent, a figure set by Weller in a prior license to another manufacturer (R. 29a-30a, 59a). Weller thus determined that the figure of $250,000 would be presented by them at the settlement conference (R. 30a, 59a).

After extensive negotiations, Wen finally agreed to pay the full amount of $250,000 in damages and to resolve the steel tip problem in favor of Weller, provided that it be allowed to continue in business under a license (R. 61a). Weller was at first reluctant to allow this competitor to continue in this field, but Wen argued that it would spend its total assets of $100,000 in litigation over the steel tip if it was going to be put out of business anyway (R. 31a, 60a).

In final form, then, the settlement agreement gave to Weller the amount of $250,000 which represented its best estimate of damages for infringement; avoided the danger that Wen would dissipate its assets in further litigation; put at rest Wen's claim as to the steel tip gun; and granted Wen a license for future manufacture and sale at a compromise royalty of 7½ per cent.

3. **Cross motions for summary judgment and the decisions below.** Both sides moved for summary judgment on the ground that there was no dispute of fact. Miller took the position that the language of the partnership withdrawal contract entitled him, as a matter of law, to 15 per cent of the royalties paid and to be paid by Wen to Weller on and after May 1, 1956 (R. 43a). Weller took the position that the plain meaning of the partnership withdrawal agreement, as well as the proper legal construction of its language, clearly showed that Miller was not entitled to share in the royalty payments (R. 53a).

The district court rendered its opinion on June 8, 1960, granting Miller's motion (R. 80a-84a). The Court of Appeals reversed in a 2-1 decision. Determining that the withdrawal agreement was to be construed according to Pennsylvania law and that there was no material fact in dispute, Judge Goodrich, joined by Judge Forman, ruled that "damages" is a word of art with a rather definite meaning which does not embrace the concept of royalties. The Court of Appeals held that Miller had received his contractual share of the damages paid by Wen and that he is not entitled to any part of the royalties received or to be received for manufacture of this patented product (Pet. 12-13).

Argument.

This case involved only the proper construction under Pennsylvania law of one clause of an agreement between Miller and his former partners, concerning the amount to be paid in liquidation of Miller's interest upon his withdrawal from the partnership. The matter was submitted to the district court on cross motions for summary judgment, both parties agreeing that there was no dispute as to any material fact. The Court of Appeals for the Third Circuit held, as a matter of state law, that Miller's claim was without merit, and directed that summary judgment be entered in favor of the defendants and against Miller, who now seeks review of that decision by this Court.

The clear purport of the partnership withdrawal agreement was that Miller would only share in any damages, obtained by judgment or otherwise, to compensate for Wen's unlawful use of the patented soldering gun. The withdrawal agreement severed entirely Miller's connection with the partnership (R. 7a, 9a-10a). He was fully compensated, receiving approximately $121,000 for his capital interest plus $75,000 over five years "in consideration for past services to the partnership."

The only item which could not be precisely valued as of the date of the withdrawal agreement was the patent litigation then pending. To cover this aspect of the liquidation of Miller's interest in the firm, the agreement provided that Miller would receive 15 per cent of

> "**any damages** collected by the partnership subsequent to the date of this agreement (whether by award of court or jury, or by an out-of-court settlement of any type whatsoever)"

The proper construction of this language was the crux of the dispute.

The provision recognized that the further conduct of the patent litigation was the responsibility of the continuing partners and that, in the conduct of that litigation, they might either press to final judgment or determine that the dispute should be settled.

The key word which fixed the fund in which the retiring partner was to be accorded a 15 per cent share was "damages". The clear meaning of "damages", both in everyday speech and as a word of art in the law, is compensation received for injury already suffered. In well-understood legal terminology, "Damages means compensation for a legal injury sustained." **Sechrist v. Bowman**, 307 Pa. 301, 310, 161 Atl. 332, 335 (1932). See also, **Duplate Corp. v. Triplex Safety Glass Co.**, 298 U. S. 448, 451 (1936); **Birdsall v. Coolidge**, 93 U. S. 64 (1876); **Freigy v. Gargaro Co.**, 223 Ind. 342, 349-351, 60 N. E. 2d 288, 291-292 (1945).

As Judge Goodrich said below (Pet. 12-13):

> "• • • 'Damages,' we think, is a word of art with a rather definite meaning. It is something paid in recompense for an infringement of a plaintiff's legal right by the defendant's liability-creating conduct. • • •"

Significantly, Miller has not referred to any decision, and we have found none, which indicates that "damages" has any other meaning than that ascribed to it by the Court of Appeals; and neither the district judge nor Judge McLaughlin, dissenting below, cited any authority on this critical point.

The agreement anticipated that "damages" might be derived from a settlement of the infringement claim against Wen. However, the provision in this regard in no way broadened the fund to give Miller a right to share in the future earnings of the partnership. Looking at the partnership agreement, there can be no doubt that the parties

intended that Miller share only in whatever compensation was obtained for past infringement.

That this is the plain meaning of the clause, based on the universal understanding of the term "damages" and the uniform meaning given in decided cases, is reinforced by the fact that the agreement was carefully drawn by attorneys. As Judge Goodrich noted below (Pet. 13), given a legal word of art used in such circumstances, the proper disposition of the case in Weller's favor is dictated by the familiar principle that the clear and well established meaning of the words of an agreement must be taken as decisive in construing the agreement for the purpose of ascertaining intent.

Since the withdrawal agreement is to be construed under Pennsylvania law, the statement of Justice (later Chief Justice) Charles Alvin Jones in **Fischer & Porter Co. v. Porter**, 364 Pa. 495, 500, 72 A. 2d 98, 101 (1950), is particularly apt:

> "• • • The contract was neither ambiguous nor of doubtful meaning. The several technical terms which it contained were but appropriate words of art, essential in the circumstances to a clear and adequate definition of the intended subject matter. It is fundamental that 'Technical terms and words of art are [to be] given their technical meaning unless the context or a usage which is applicable indicates a different meaning': Restatement, Contracts, § 235(b). And, this rule is especially applicable where the words of art used are legal terms: 17 C. J. S. § 302, p. 720. • • •"

The decision of the Court of Appeals, resting as it does on sound rules of documentary construction and Pennsylvania law, fully satisfies the purpose of the partnership withdrawal agreement.

The factors which motivated and shaped the settlement with Wen are briefly described in our statement of the case,

supra, pp. 3-4. The settlement dealt with two separate problems. First the infringement litigation was terminated by Wen's agreement to pay $250,000 damages, which represented the amount of damages on which Weller had consistently insisted all during the negotiations. Termination of the litigation by settlement also avoided the danger that Wen would dissipate its remaining assets in litigation and leave Weller with only a $50,000 supersedeas bond to satisfy any judgment obtained (R. 59a, 65a, 77a).

The settlement also dealt with an entirely separate area, the possibility that Wen's steel tip gun was not covered by Weller's patent. Weller's reluctant grant of a license to Wen, on terms under which Wen surrendered this claim, solved the problem and, at the same time, put Wen in a position where it could arrange for the payment of damages.

Thus, the settlement embraced two separate areas, one past and one future. The first resolved the claim for damages for unlawful use; the second established a business relationship thereafter. Combining both aspects of the settlement of Weller's difficulties with Wen in one document was a matter of convenience to the parties (R. 63a). In no way can it be said that these two facets became one indivisible contract. Rather the solutions of these cross disputes plainly constitute separate and divisible contracts or transactions. See **Sachs v. Brown-Forman Distillers Corp.**, 134 F. Supp. 9, 14-15 (S. D. N. Y. 1955), *aff'd per curiam*, 234 F. 2d 959 (2d Cir.), *cert. denied*, 352 U. S. 925 (1956); **Canister Co. v. Wood & Selick, Inc.**, 73 F. 2d 312, 314 (3d Cir. 1934), *rehearing denied*, 74 F. 2d 1009, *cert. denied*, 296 U. S. 590 (1935).

Consequently, the plain meaning of the settlement agreement is fully supported by the uncontroverted facts of record which explain the occasion for and the nature of the settlement. The payment of damages is distinct and separate from the grant of a license for future use of the disputed patent. And, as the Court of Appeals prop-

erly held, the meaning of the partnership withdrawal agreement under Pennsylvania law, as well as under the law of all jurisdictions where the meaning of "damages" has been passed upon, is clear.

The Court of Appeals for the Third Circuit adheres to the principle that summary judgment will be granted only when every material fact is undisputed. See **Bragen v. Hudson County News Co.**, 278 F. 2d 615 (3d Cir. 1960); **Krieger v. Ownership Corp.**, 270 F. 2d 265 (3d Cir 1959). Such is the case here. The facts are uncontroverted, and both parties so argued in presenting their respective motions for summary judgment.

Consequently, the facts being clear and the applicable law indisputable, we respectfully submit that judgment was properly granted for Weller in this case. **Sterneck v. Equitable Life Insurance Co.**, 237 F. 2d 626 (8th Cir. 1956).

CONCLUSION.

For the foregoing reasons, the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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